



# *Town of Brookline*

## *Massachusetts*

(617) 730-2130 Fax (617) 730-2442

Linda K. Hamlin, Chairman  
Steven A. Heikin, Clerk  
Robert Cook  
Sergio Modigliani  
Mark J. Zarrillo

### **ARTICLE XII**

### **PLANNING BOARD REPORT AND RECOMMENDATION**

This article, submitted by citizen petitioner Lee Selwyn, proposes to modify the Brookline Zoning Bylaw's definition of "Habitable Space," *Section 2.08.1*, so that areas in a building that are intended for human occupancy, either now or in the future, and without regard to present finishes, would count toward gross floor area. The Zoning By-law uses gross floor area and floor area ratio limits to restrict the overall size of a building on a lot; minimum setbacks and maximum height limits also restrict a building's dimensions. Some neighborhoods, like Local Historic and Neighborhood Conservation Districts, are further protected by the jurisdiction of the Preservation Commission or the Neighborhood Conservation District Commission, which may further restrict a development's size, height and or setbacks.

Under the proposed amendment, habitable space would not only include finished floor area, but also any building area that either meets or could meet the requirements for habitable space under the Massachusetts Building Code. Currently, unfinished attic and basement space within a building is not counted towards a home's total gross floor area – this amendment would change that. The amendment's goal is to restrict new buildings from being constructed with large unfinished basements and/or attics in preparation for future conversion into finished floor area after 10 years.

Currently, the Town's Zoning By-law allows for single- and two-family homes to exceed the current floor area ratio (FAR) limits by up to 50 percent by-right when unfinished attic or basement space is converted to finished floor area. Such conversions are allowed by right to encourage homeowners to finish existing space, rather than construct an addition, where possible. Homes need to have been in existence for at least 10 years in order to take advantage of this, or any other, FAR exemption. The petitioner argues that developers are overbuilding new homes with large areas of unfinished space so that they can be converted after the 10-year time requirement.

Brookline has been working for years to develop appropriate ways for homeowners to expand into existing attics and basements to accommodate growing family needs, as well as offer incentives to retain existing structures. These regulations can largely be found in the Zoning By-law under *Section 5.22, Exceptions to Maximum Floor Area Ratio (FAR) Regulations for Residential Units*. The current 10-year "waiting period" for both attic and basement conversions was adopted by Town Meeting in the spring of 2005 and 2006. When the warrant article was initially drafted, the proposed FAR exemptions under *Section 5.22* were available only to structures already in existence when the amendment was passed; however, when the Attorney General's office reviewed the amendment, it was declared illegal to not treat existing structures

and new structures equally. The 10-year waiting period was adopted to address the Attorney General's concerns.

The Planning Board recognizes that there have been a number of instances where new homes have been built with unfinished attics and basements, and often, these areas may have windows or dormers and adequate ceiling heights to allow for future conversion. When investing money in the construction or renovation of a home, developers are working to maximize the home's value, which includes future expansion possibilities. Additionally, unfinished floor area is often used for mechanical and storage space. However, these new homes can feel too large for the neighborhood, and large areas of unfinished space can be concerning for neighbors who are impacted by the size of a new home.

Unfortunately, the current warrant article does not address these concerns directly and would have wider ranging implications. Including unfinished space in gross floor area would increase the non-conformity of many existing homes, thereby increasing the number of homeowners who are not able to take advantage of the existing FAR exemptions allowable by special permit. Since this amendment is really designed to limit the ability to expand homes under *Section 5.22*, a brief review of what those exceptions entail is appropriate. The explanation that accompanies the proposed amendment has already described the by-right conversion of attics and basements in single- and two-family homes up to 150 percent of allowed floor area. *Section 5.22* also allows for the Board of Appeals to grant special permits for other expansion options: by exterior addition up to 120 percent; by interior conversion or a combination of interior conversion and exterior addition up to 130 percent; and for additions less than 350 square feet, up to 150 percent of allowed floor area. This last option is often useful for home owners whose homes are already over the 120 percent threshold, but still want a small addition, i.e. a mudroom or kitchen expansion. All of these options are available only by special permit, only for homes in certain residential zoning districts, and only if the home has not received prior grants for additional gross floor area, including the attic/basement expansion option.

The Planning Board is concerned that by changing the definition of habitable space, so that essentially any unfinished space that could meet occupancy standards must be counted towards gross floor area, a number of existing homes that have unfinished attics or basements could be made non-conforming in a way that restricts their expansion options under *Section 5.22*. For example, a large unfinished basement could push a home's FAR over 150 percent of allowed, and the homeowners would no longer be able to expand their kitchen, add a mudroom, or enclose a back deck, except by variance. Special permit applications for FAR exemptions are submitted relatively frequently by typical Brookline homeowners seeking to improve their homes.

The proposed warrant article introduces an element of uncertainty into the zoning process: the Building Commissioner would need to determine if there is intent to modify space for future living area. For example, when plans are submitted for a new home with an unfinished basement, the Building Department would determine if the home's future occupants will want to convert a portion of the basement for a playroom, or if the space is really designed for storage and mechanical space. Outside of the need to determine intent, redefining "habitable space" so that it includes unfinished space, but retaining the unfinished space exemptions in the "gross floor area" definition, even though they would no longer apply, generates confusion and complicates an already complicated Zoning By-law. This lack of clarity could lead to inconsistent interpretation of regulations and a lack of predictability.

There are other alternatives more appropriate for addressing what seems to be the root of the problem: exceedingly large new homes. The Planning Board would prefer solutions that directly

address the raised concerns, including modifying the overall allowed FAR or lowering the total allowed through attic and basement conversion. Other alternatives include requiring a special permit for attic/basement conversions similar to what is required for exterior additions; lowering the allowed 150 percent FAR for attics and basements to 130 percent, in line with what is currently allowed for other interior conversions; or lengthening the time required prior to conversion. If neighborhoods wish for new development to be smaller, then restricting the extent of existing FAR exceptions is a more direct way to address the issue.

The Planning Board does not support the proposed amendment. While the Board recognizes that developers are planning ahead for future expansion, the current amendment has broader ramifications for existing properties, adds complexity to an already confusing issue, and may have unintended negative consequences on the design of new homes, such as encouraging unattractive shallow roof pitches. The proposed amendment would likely prevent the construction of new homes with unfinished attics and basements. But the future expansion possibilities for existing homes could be dramatically limited; intent of future use cannot be measured objectively, and the amendment's terms and phrases promote inconsistent interpretation of the By-law. Finally, the Board foresees other unintended consequences, including changes in home design as a very likely result of this amendment. While the Board is opposed to this particular warrant article, it does support further discussion of the "McMansion loophole" issue, especially in the context of how much floor area is reasonable on a property, and how the Zoning By-law can best regulate floor area and still offer clear incentives for preserving a home.

Caution needs to be exercised in proposing zoning changes directed at the new construction of single- and two-family dwellings, since any new regulations are required to apply equally to existing and new structures. In 2014, the Building Department issued nine building permits for new detached single-family homes; in 2015, eight building permits have been issued to date. In contrast, 23 applications were submitted for special permit relief for FAR in 2014<sup>1</sup>. The consequences of this amendment will have a far greater impact on existing homes than on the relatively few new single-families built each year.

**In sum, the Planning Board is not in favor of this article for the following reasons: 1) a large number of homeowners would be restricted from expanding their existing older homes, no matter how small the addition, because counting unfinished basement and attic spaces would result in exceeding the allowable floor area for a special permit; 2) the amendment complicates rather than clarifies gross floor area regulations, because intent of future use cannot be measured objectively; and 3) the design of new homes could be negatively impacted because lower pitched or flat roofs, used to avoid attic space being counted toward the floor area, could be unattractive.**

Notwithstanding the Planning Board's unanimous agreement that the Petitioner's solution is inappropriate, the Planning Board believes the wider issue that has been raised has merit and should be studied further.

**Therefore, the Planning Board recommends REFERRAL on Article XII to a committee for a report back to Spring 2016 Town Meeting.**

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<sup>1</sup> Source: GeoTMS Database Search, 9/30/2015